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UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF NEW YORK

Case No. 09-47792-cec

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In the Matter of:

EAST FOURTEEN GARDENS INC.,

Debtor.

- - - - -x

U.S. Bankruptcy Court

271 Cadman Plaza East

Brooklyn, New York

March 16, 2011

3:26 PM

B E F O R E:

HON. CARLA E. CRAIG

U.S. BANKRUPTCY JUDGE

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2 Order Scheduling Status Conference for the Purpose of

3 Determining an Appropriate Schedule for the Proper

4 Administration of this Case [9]

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6 Motion to Approve Modification of a Confirmed Plan [86]

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25 Transcribed by: Dena Page

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2 A P P E A R A N C E S :

3 LAW OFFICES OF DAVID CARLEBACH

4 Attorneys for Debtor

5 40 Exchange Place

6 New York, NY 10005

7

8 BY: DAVID CARLEBACH, ESQ.

9

10

11 NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE

12 Attorneys for New York State

13 1740 Broadway

14 New York, NY 10019

15

16 BY: DEBORAH DWYER, ESQ.

17

18

19 UNITED STATES DEPARTMENT OF JUSTICE

20 Office of the United States Trustee

21 271 Cadman Plaza

22 Brooklyn, NY 11201

23

24 BY: JACQUELINE A. FROME, ESQ.

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EAST FOURTEEN GARDENS INC.

1 P R O C E E D I N G S

2 THE CLERK: Number 14 and 15, East Fourteen Gardens.

3 MR. CARLEBACH: Good afternoon, Your Honor. This is
4 the debtor's motion --

5 THE CLERK: State your name, please.

6 MR. CARLEBACH: David Carlebach representing the
7 debtor, East Fourteen Gardens Inc. This is the debtor's motion
8 to modify the plan without the need for further solicitation.
9 It's being done pursuant to Section 1127(a) and, I believe,
10 Rule 3019(b) which effectively contemplates that where there
11 has not been substantial consummation of a plan, the Court has
12 the ability to order that the plan not be resolicited for a
13 vote to creditors. Essentially --

14 THE COURT: And why -- and you don't think this is a
15 material modification?

16 MR. CARLEBACH: No. Essentially, the only thing
17 that's happening here is that the settlement agreement
18 contemplated a deed in lieu of foreclosure. We were
19 effectively transferring the property to the mortgagee. They
20 asked for a deed in lieu of foreclosure. They discovered that
21 if they took a deed in lieu of foreclosure, the mortgage would
22 be extinguished, and they would -- apparently, still needed to
23 have a mortgage on the property. They would have to go and, in
24 Pennsylvania, pay a couple of hundred thousand dollars in
25 mortgage recording tax to record a new mortgage. So they

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1 requested that instead of having it a deed in lieu of
2 foreclosure, it be a simple quit claim deed and that the
3 mortgage remain in existence. And it simply required that
4 modification of the settlement agreement.

5 In exchange for that, they did give substantial
6 benefits to the debtor. The 67,000 dollar credit against
7 certain taxes which we would have otherwise had to be
8 responsible for, they agreed to be responsible for it.

9 But the point being that there's absolutely no party
10 whose rights were affected in any way by this modification.

11 THE COURT: Here's what I would say. As long as
12 you're putting -- is that 67,000 dollars is going to the
13 unsecured creditors in addition to what's already in the plan
14 for them, then I would agree. But they might want to know
15 whether to vote on -- whether they want to accept a plan where
16 there's 67,000 dollars more because you were only going to pay
17 them -- you're not paying them very much, right? What's the
18 amount?

19 MR. CARLEBACH: I believe it was ten cents on the
20 dollar.

21 THE COURT: Ten cents on the dollar which comes to
22 five percent -- five percent distribution. So I'd say that
23 this money should not be going into the debtor's pocket; it
24 should go to the unsecured creditors.

25 MR. CARLEBACH: Well, essentially, it was the debtor's

EAST FOURTEEN GARDENS INC.

1 principal that was going to have to fund these taxes, so it's
2 really -- it's an accommodation to the debtor's principal. It
3 would be -- it's simply -- it's money that he would have
4 otherwise had to go into his pocket to fund.

5 THE COURT: Well, he was -- but, the plan was
6 confirmed on the basis that that was what was going to happen.

7 MR. CARLEBACH: That's correct.

8 THE COURT: And now you've got an extra 67,000
9 dollars, and why shouldn't that go to the unsecured creditors
10 instead -- if you want to tell -- if you're telling me that
11 nothing has happened that would change their vote in this plan,
12 if they knew that there's another 67,000 dollars here but it's
13 going into the debtor's principal's pocket, then that might be
14 something that they find material.

15 MR. CARLEBACH: I understand your point. I would have
16 to go back to the debtor's principal and I would have to ask,
17 then, for an adjournment of the motion because I can't -- the
18 debtor's principal's unfortunately not here now. I can't
19 consent to that on the record without his --

20 THE COURT: Understood.

21 MR. CARLEBACH: Yes, I would -- I would simply ask
22 that the motion be adjourned subject to --

23 THE COURT: Yeah, I assume this doesn't have to be a
24 lengthy adjournment.

25 MR. CARLEBACH: No, I mean, and in fact, it's the --

EAST FOURTEEN GARDENS INC.

1 the most unhappy people are going to be the mortgagee who
2 really want to -- apparently the close --

3 THE COURT: Let's do it -- let's make it a short
4 adjournment because I don't see why a windfall should go to the
5 debtor's principal when in -- especially in a case where
6 there's a five percent distribution over time, right? Not even
7 up front.

8 MR. CARLEBACH: I don't disagree with Your Honor. I
9 would simply -- the characterization of a windfall where you
10 would have to pay X and it's --

11 THE COURT: Well, it's a windfall in the sense that a
12 plan was confirmed based upon a transaction -- and a plan that
13 was approved pursuant to which he agreed to fund this amount.
14 He agreed that -- or, it was contemplated in the plan that this
15 amount was going to be funded by him.

16 MR. CARLEBACH: That's correct.

17 THE COURT: So this development here is a windfall in
18 the sense that it was -- it came about not by any effort or
19 activity that he undertook, so it's a windfall for somebody.
20 And it ought to be a windfall to the unsecured creditors, not
21 to him.

22 MR. CARLEBACH: It was certainly unexpected. That I
23 was -- so --

24 THE COURT: Okay.

25 MR. CARLEBACH: I'm not -- I don't mean to -- if a

EAST FOURTEEN GARDENS INC.

1 windfall is the way the Court --

2 THE COURT: Windfall in the sense that it wasn't
3 somehow -- that he didn't somehow -- there was no -- any
4 consideration given by him for this, right?

5 MR. CARLEBACH: This is correct. I only take issue
6 with the windfall is that there isn't any money coming into his
7 pocket. It just means that he's got to go into his pocket a
8 little less deep than he might have.

9 THE COURT: By windfall, I mean something that falls
10 out of a tree, which I think -- guess is the literal meaning of
11 windfall, that it's not something that was expected or
12 contemplated or obtained through a transaction for which there
13 was consideration given by him.

14 MR. CARLEBACH: This is true.

15 THE COURT: Okay, so that's my view. That the money
16 should go to the unsecured creditors. And so there may need to
17 be a further amendment to the plan that provides that they get
18 a five percent distribution plus the 67,000 dollars up front.

19 MR. CARLEBACH: And I assume that that would also not
20 require a resolicitation.

21 THE COURT: I don't think that would require
22 resolicitation.

23 MR. CARLEBACH: Okay, then I would simply --

24 THE COURT: I don't see -- is there anybody who could
25 be potentially even disadvantaged by that? I can't see how.

EAST FOURTEEN GARDENS INC.

1 MR. CARLEBACH: By getting more money? I don't think
2 so.

3 THE COURT: Is there any class of creditors other than
4 the unsecured creditors?

5 MR. CARLEBACH: The only creditors that are impaired
6 are the unsecureds. Everybody else, priority and -- priority
7 is being paid in full, tax -- essentially tax claims are being
8 paid in full, and --

9 THE COURT: Have they been -- they're being paid in
10 the course of this transaction, I suppose, right?

11 MR. CARLEBACH: Correct.

12 THE COURT: Yeah.

13 MR. CARLEBACH: Correct. In fact, New York State is
14 here. There was an issue of some outstanding; we resolved
15 that. But the plan contemplates one hundred percent of all
16 priority creditors and those issue were worked through during a
17 very lengthy closing which took a couple of months and --

18 THE COURT: But I assume they're not being paid over
19 time.

20 MR. CARLEBACH: No.

21 THE COURT: They're being paid in the context of the
22 closing.

23 MR. CARLEBACH: Correct.

24 THE COURT: Yeah.

25 MR. CARLEBACH: That's correct.

EAST FOURTEEN GARDENS INC.

1 THE COURT: Okay. Okay, anything else?

2 Yes?

3 MS. DWYER: Good afternoon, Your Honor. Deborah
4 Dwyer, New York State Tax.

5 Your Honor, I just wanted to say that we've just been
6 handed the tax returns in this matter and they need to be
7 processed. Not disputing anything that Mr. Carlebach says and
8 that we're going to be paid in full. Whether or not the use of
9 the correct numbers, I don't know yet because tax returns have
10 just been presented. So an adjournment works to the state's
11 advantage, as well --

12 THE COURT: Okay. All right.

13 MS. DWYER: -- because we'll know what position we're
14 supposed to be in, then.

15 THE COURT: How long?

16 MS. FROME: Your Honor, if I may put on the record, we
17 haven't received any post-petition operating reports. I've
18 spoken to counsel about that and he's told me he'll speak to
19 his client about updating those reports. Just to put that on
20 the record.

21 THE COURT: Okay, yes, please do.

22 MS. FROME: Your Honor, also --

23 THE COURT: Please bring the reports up to date, Mr.
24 Carlebach.

25 MR. CARLEBACH: Yeah, I -- we will do that. I would

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1 ask for a brief adjournment on my motion, because as I said,
2 the mortgagee is very focused on getting the transaction
3 closed. I will give the state --

4 THE COURT: Can we give you a week on that?

5 MR. CARLEBACH: That's fine.

6 THE COURT: Is that -- 3/23? Is that the date? Yeah,
7 3/23's next week, right? What time? Is that okay, Tracy?

8 THE CLERK: Let me just see what you have. 2:30.

9 THE COURT: At 2:30. Okay.

10 MR. CARLEBACH: Okay.

11 THE COURT: This is the only thing that's on the
12 calendar today other than the status conference. I'm going to
13 put them both over to the 23rd, okay?

14 MS. DWYER: Your Honor, just to say, it's going to
15 take us longer than a week to process the returns, though. I
16 don't want to --

17 THE COURT: Understood. But there will be further
18 conferences, I think, until this case is -- 'til a final decree
19 is issued. I mean, I don't know what issue -- I don't know --
20 what are you going to want from me about -- how does this
21 pertain to the Court, your review of these tax returns?

22 MS. DWYER: It doesn't, Your Honor.

23 THE COURT: Okay.

24 MS. DWYER: I just need time to have this --

25 THE COURT: Time for what, though. Time from --

EAST FOURTEEN GARDENS INC.

1 MS. DWYER: They have to be processed; the tax returns
2 have to be processed, assuming they're correct.

3 MR. CARLEBACH: Your Honor, I think I can put it in
4 context. As we discussed, tax claims, these are -- this is
5 pursuant -- these tax returns are paying a proof of claim that
6 was filed by New York State. And it's contemplated that we pay
7 that claim one hundred cents on the dollar. So counsel for New
8 York State is simply saying we need to make sure that the
9 monies you've given us, in fact, pay that claim in full prior
10 to the closing of the case, and I've assured her, and as Your
11 Honor has suggested, there'll be enough time for her to do her
12 due diligence and make sure that those issues will be resolved.

13 THE COURT: Then these are not real estate taxes, I
14 take it?

15 MS. DWYER: No, this is corporation tax.

16 THE COURT: Right, okay. Have you been paid anything
17 on that?

18 MS. DWYER: Well, I've just been handed several checks
19 today --

20 THE COURT: Okay.

21 MS. DWYER: -- as well, so.

22 THE COURT: All right. All right, so I'll put this
23 over to the 23rd.

24 MR. CARLEBACH: Thank you, Your Honor.

25 MS. DWYER: Thank you, Your Honor.

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1 MS. FROME: Thank you, Your Honor.

2 Your Honor, before we go on to the next matter, may we
3 have leave to put in papers, if we need to respond?

4 THE COURT: On what?

5 MS. FROME: The proffers made by counsel today have
6 raised certain issues that I have not considered, and --

7 THE COURT: Like what?

8 MS. FROME: The -- I understood that deed to be -- I
9 understood it was still going to be a deed in lieu of
10 foreclosure, and it was going to be sold to another party and
11 the mortgage was going to be transferred to another party. I
12 think I may have misunderstood, and I'd like to speak with Mr.
13 Carlebach about that.

14 THE COURT: Well, how does that relate -- what issue
15 do you see coming up as a result of that?

16 MS. FROME: I -- it sounded from the proffer like the
17 mortgage is going to stay with the debtor.

18 THE COURT: No, it's being assigned --

19 MR. CARLEBACH: No.

20 THE COURT: -- I assume, right?

21 MR. CARLEBACH: That's correct. It's being assigned
22 to the mortgagee. They're taking over the mortgage so they
23 don't have to --

24 MS. FROME: Okay, that's what I --

25 THE COURT: So they don't have to pay mortgage

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1 recording tax.

2 MR. CARLEBACH: Correct, correct.

3 MS. FROME: So the debtor will not have -- okay.

4 MR. CARLEBACH: No, the debtor will retain no interest
5 in this.

6 THE COURT: Well, you can -- Ms. Frome, you can put in
7 papers any time you want to. You --

8 MS. FROME: I just ask because only -- it's a week
9 from today and it would be --

10 THE COURT: Okay, do you need more -- are you asking
11 me to set this at a later date?

12 MS. FROME: No, no, I'm not asking for more time, Your
13 Honor.

14 THE COURT: All right, okay.

15 MR. CARLEBACH: Incidentally, the transaction is set
16 forth very clearly in the exhibit, which you can take a look
17 and see that.

18 THE COURT: Okay, thanks.

19 MS. FROME: Thank you, Your Honor.

20 (Whereupon these proceedings were concluded at 3:38 PM)

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C E R T I F I C A T I O N

I, Dena Page, certify that the foregoing transcript is a true
and accurate record of the proceedings.

A handwritten signature in blue ink that reads "Dena Page". The signature is written in a cursive, flowing style.

DENA PAGE

eScribers, LLC

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Date: March 17, 2011